NARAYANAN CHETTIAR RAMAN CHETTIAR

v.

SAMUEL JIVAMONEY DASS CHELLIAH

HIGH COURT MALAYA, KUALA LUMPUR
LC VOHRAH J
[CIVIL SUIT NO. 2388 OF 1978]
5 DECEMBER 1985

CONTRACT: *Sale of land - Whether relevant clauses breached - Specific performance - Waiver - Conduct of defendant and plaintiff considered - Third parties - Fraud or un-conscionable conduct - Natural justice - Improper conduct of Land Office.*

DAMAGES: *Assessment - Section 74 Contracts Act - Section 18(4) Specific Relief Act - Conduct of defendant - Legal costs.*

ADMINISTRATIVE LAW: *Natural justice - Audi alteram partem - Third parties - Order of specific performance.*

The plaintiff (purchaser) and defendant (vendor) entered into a written sale and purchase agreement of the said property, on 9 November 1977. As provided in clause 1 of the agreement, the defendant received RM14,000 in cash from the plaintiff. At the request of the defendant, the completion date as stipulated in clause 2 was later extended to 9 March 1978. The property was at that time charged to the Overseas Chinese Banking Corporation (hereinafter referred to as "OCBC") to secure the overdraft account in the name of "Jurubangunan Konkrit", a sole proprietorship owned by the defendant who had no other account with OCBC. The plaintiff purported to pay the balance of the purchase price to OCBC but of no avail since OCBC refused to accept the cheque. The defendant executed the transfer of the property. In 1978, a Mohd. Rethashah bin Talib became the registered owner after purchasing the property from the defendant at a price of RM122,000. The property is now charged to Central Malaysian Finance Bhd. Neither one of them has been made a party to this suit. The plaintiff filed this claim on 5 January 1981, asking for specific performance, damages and other ancillary reliefs in respect of the said property. The Court has to decide whether the plaintiff has breached clause 2 (payment of the balance of the purchase price) of the agreement and if so, whether there has been waiver on the part of the defendant.

Held:

[1] On the facts and evidence, it is clear that it was the defendant's general conduct that prevented the plaintiff from performing his part of bargain to the very letter. There has therefore been no breach of clause 2 by the plaintiff.

[2] It is clear from the evidence that things were not done in a proper and business-like manner at the Land Office at the time period concerned here. The endorsements were not made promptly on the Register Document of Title and furthermore the endorsement made in this particular case was illegally removed.

[3] In the event, Mohd. Rethashah and Central Malaysian Finance Bhd. have acquired vested rights to the property and although the conduct of the defendant in this case clearly shows a want of probity on his part, there is no evidence at all to suggest that any fraud or unconscionable conduct could in any way be attributed to both or either of them.

[4] Therefore in this case, any order for specific performance would obviously breach the fundamental principle of natural justice and the *audi alteram partem* rule as neither Mohd. Rethashah nor Central Malaysian Finance Bhd. has been joined as a party and been afforded the opportunity of being heard.

[5] In the circumstances, an award of damages against the defendant would be appropriate for his repudiation of the contract in making it impossible for the plaintiff to perform his part of the agreement.

[6] As to the measure of damages, taking into consideration s. 74 of the Contracts Act 1950 and s. 18(4) of the Specific Relief Act 1950, this is an appropriate case for compensation to be awarded as "the market value of the property at the contractual time less the contract price" is impossible to ascertain (*Lee Hoy & Anor. v. Chen Chi* [1971] 1 MLJ 76 at 78).

[7] Therefore, taking into account of the defendant which compelled the plaintiff to take legal action to enforce his rights, the plaintiff should be entitled to all his legal costs arising out of the execution of the agreement. In the absence of concrete evidence, compensation was assessed under this head at RM10,000.

[Judgment for plaintiff.]

Cases referred to:
Lee Hoy & Anor. v. Chen Chi [1971] 1 MLJ 76
Central Malaysia Development Co. Ltd. v. Chin Pak Chin [1967] 2 MLJ 174

Legislation referred to:
Contracts Act 1950, s. 74
Specific Relief Act 1950, ss. 18, 18(4)

For the plaintiff - G. Sri Ram and Mr. Manjit Singh; M/s. Sri Ram Zulkifly & Kumar
For the defendant - Vincent Ponniah; M/s. Ng Ek Teong & Partners

JUDGMENT

LC Vohrah J:

The plaintiff's claim is for specific performance, damages and other ancillary reliefs in respect of a written agreement (See AB3) executed on 9 November 1977 between the plaintiff and the defendant for the sale by the defendant to the plaintiff of all that land together with the building erected thereon held under State Lease No. 2468 Lot 274 in the Town of Petaling Jaya ("the property").

It has been conceded by the defence that AB3 is a valid and genuine sale and purchase agreement and the Court has only to decide whether the plaintiff has been in breach of clause 2 and, if so, whether there has been waiver on the part of the defendant.

The relevant clauses in AB3 which require specific consideration are, for convenience, reproduced hereunder:

> 1. In consideration of RM14,000 now paid by the purchaser to the vendor the receipt of which the vendor hereby acknowledges, the vendor hereby agrees to sell the said land to the purchaser for the sum of RM47,000 free from encumbrances.
>
> 2. The balance sum of RM33,000 shall be paid directly to the Overseas Chinese Banking Corporation on the 9th day of the February 1978.
>
> **Provided Always it is** expressly agreed that the purchaser shall pay to the said bank any interests that may have accrued and exceeded the said balance sum of RM33,000 notwithstanding that the express selling price is RM47,000.
>
> 8. Time wherever mentioned shall be the essence of this agreement.

The material facts which I have found undisputed or proved are as follows. The defendant received the sum of RM14,000 in cash as provided in clause 1. The completion date as stipulated in clause 2 was later extended to 9 March 1978 at the request of the defendant (See AB14 and AB15). At this time the property was charged to the Overseas Chinese Banking Corporation Limited ("OCBC") to secure the overdraft account in the name of "Jurubangunan Konkrit", a sole proprietorship owned by the defendant who then had no other account with OCBC. On 9 March 1978 the plaintiff through his solicitors, Messrs Shearn Delamore & Company, sent a cheque (see AB8) for the sum of RM33,000 to the solicitors for OCBC, Messrs C.H. Liew & Co., and at the same time they wrote to the defendant informing him that the plaintiff had paid "the balance of the purchase price amounting to RM33,000 by cheque in favour of Overseas Chinese Banking Corporation to M/s. C.H. Liew & Co." and requesting the defendant to call at their office to execute the transfer of the property to the plaintiff (See P2). Messrs C.H. Liew & Company wrote back on the very same day (See P1) intimating that they were not responsible for the payment to OCBC and were returning the cheque and that there was "also outstanding interest on the balance sum owing" and as at 9 March 1978 the amount actually owing by Jurubangunan Konkrit was RM34,435.61. On the very next day the plaintiff went to OCBC to pay in the cheque himself but was advised that it could not accept the payment for the discharge of the overdraft account without a letter of authorisation from the defendant. On 29 April 1984 the defendant, in reply to P2, informed Messrs Shearn Delamore & Company that he would call at their office to execute the transfer of the property on or before 31 May 1978 (See AB17). He never did so. On 5 January 1981 after the filing of this claim on 1 September 1978 one Mohd. Rethashah bin Talib became the registered owner after purchasing the property from the defendant at a price of RM122,000. The property is now charged to Central Malaysian Finance Berhad. Neither Mohd. Rethashah nor Central Malaysian Finance Berhad has been made a party to this suit.

I accept the plaintiff's evidence that prior to the sending of the letter AB16 by Messrs Shearn Delamore & Company enclosing AB8, the plaintiff had called at the office of Messrs C.H. Liew & Company and had waited there until 10.00 a.m. for the arrival of the defendant but to no avail. It is clear from the evidence that the defendant has had business experience running Jurubangunan Konkrit since 1978 and was (by his own admission) familiar with banking arrangements so that he should have been aware that no discharge could be effected without his specific authority. I do not accept his

explanation that the only reason for his signing AB17 was that he thought the balance of the purchase price had been paid to OCBC especially when he admitted that he had not given the plaintiff the necessary authority to effect the discharge. The defendant must have known that it would have been impossible for the plaintiff to effect the discharge in the absence of his own specific direction to Messrs C.H. Liew & Company or to OCBC to allow the plaintiff to do so. On the other hand, the plaintiff's conduct in calling on Messrs C.H. Liew & Company, who were OCBC'S solicitors and who had acted for both the plaintiff and the defendant, was perfectly reasonable and evinced, in my view, a clear intention on the plaintiff's part to settle the balance due on 9 March 1978. It seems obvious to me, and I find for a fact, that it was the defendant's general conduct that prevented the plaintiff from performing his part of the bargain to the very letter. I accordingly find that there has been no breach of clause 2 by the plaintiff.

I now have to consider whether an order for specific performance should be made in this case. It is clear from the evidence of the Registrar of Titles, Selangor (PW3), that things were not done in a proper and business-like manner at the Land Office prior to his taking over duties there in that endorsements were not made promptly on the Register Document of Title and worse still, the endorsement made in this particular case was illegally removed. In the event, as has been adverted to earlier, Mohd. Rethashah and Central Malaysian Finance Berhad have acquired vested rights to the property and, although I am more than satisfied that the conduct of the defendant in this case clearly shows a want of probity on his part, there is no evidence at all to suggest that any fraud or unconscionable conduct could in any way be attributed to both or either of them. I would agree with Counsel for the defendant that in this case any order for specific performance would obviously breach the fundamental principle of natural justice *audi alteram partem* as neither Mohd. Rethashah nor Central Malaysian Finance Berhad has been joined as a party and been afforded the opportunity of being heard. In the circumstances an award of damages against the defendant would be appropriate for his repudiation of the contract in making it impossible for the plaintiff to perform his part of the agreement to the very letter.

As to the measure of damages, I have considered the provisions of s. 74 of the Contracts Act, 1950 and those of s. 18 of the Specific Relief Act, 1950 and am of the view, having regard to the claim (worded as it is) for specific performance and, additionally or alternatively, for damages, that this is an appropriate case for compensation to be awarded under sub-section 4 of s. 18 as the circumstances of the present case do not make it possible to ascertain "the market value of the property at the contractual time less the contract price". (See *Lee Hoy & Anor. v. Chen Chi* [1971] 1 MLJ 76 at page 78; *Central Malaysia Development Co. Ltd. v. Chin Pak Chin* [1967] 2 MLJ 174 at page 177). Accordingly, having regard to the conduct of the defendant which compelled the plaintiff to take legal action to enforce his rights, I am of the opinion that the plaintiff should be entitled to all his legal costs arising out of the execution of the agreement. In the absence of concrete evidence, I assess compensation under this head at RM10,000. I accordingly enter judgment for the plaintiff as follows:

(1) Compensation in the sum of RM10,000 with interest at the rate of 12% per annum from today until the date of realisation;

(2) Repayment to the plaintiff of the deposit of RM14,000 with interest at the rate of 6% per annum from the date of payment until the date of realisation; and

(3) Costs.

Also found at [1986] 1 CLJ 579